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IR Update

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How Aircraft Carrier May Strike IROs — and How to Strike Back

By Lois Yurow

Here are some ways that adoption of "Aircraft Carrier" may affect the job of the investor relations officer.

Your company will be required to file an 8-K containing certain financial information on or before the day that you announce your earnings. Don't distribute a press release or convene a conference call until you are sure that the 8-K is ready to be filed that day, that everyone who needs to approve it has done so and that all members of the board have received their copies.

Note: Unlike a 10-Q, which will need signatures of at least a majority of the members of the board, an 8-K can still be filed with just one signature. However, the person who signs must certify that he or she has provided copies of the report to all board members. Better yet, file the 8-K and distribute the press release at the same time.

Get ready for some new pressure to move the stock price up and keep it there. Remember, to qualify for form B, a company needs either a market capitalization of \$250 million or a market capitalization of \$75 million combined with a consistent average daily trading volume of at least \$1 million. Form A issuers can take advantage of some simplified offering rules more quickly if their market capitalization exceeds \$75 million. (See March Update for details on the "aircraft carrier" proposal.) Any company that is within striking distance of these thresholds may devote substantial efforts to achieving them.

If your company is making, or is about to make, a public offering, you can also expect to face these issues.

If the SEC decides that visual aids commonly used in road shows — like video and slides — are "written" rather than "oral," copies of these materials will have to be filed before they are used. If the filing requirement doesn't dissuade your company from using these media (or from holding road shows altogether), you may bear the burden of monitoring

visual aids and ensuring that everything gets filed as required. Conversely, if your company avoids the filing requirement by replacing road shows with more one-on-one sessions, you may be charged with preparing for all those additional individualized meetings and debriefing management after each one occurs.

Someone, possibly the IRO, will need to monitor press releases (or Web site "news bulletins") from a new angle. If the company sticks to purely factual business information, there's no problem. That means, for example, that your marketing team can introduce a new product with appropriate fanfare. However, if someone adds forward-looking information to the mix, like an estimate of the potential market for the new product, remember that you will now be required to file your whole statement.

Anyone who speaks on behalf of the company (including people who are authorized to post items on your Web site) will need additional training about the intricacies of the offering communications rules. If Aircraft Carrier is adopted, people with only a limited understanding of the rules may be tempted to think that "anything goes." Just as bad, unknowledgeable (or knowledgeable but unscrupulous) reporters, investors or analysts may convince a spokesperson that he or she is permitted to say things that are better left unsaid.

The ability to speak more freely may have another disadvantage. As open as you are with your investors, analysts and the media, there probably have been times in the past that you appreciated having an SEC prohibition against giving out information — if only so you could collect all the facts and contemplate every angle of your statement. The new rules will take a bit of strength out of your shield, especially if you represent a form B issuer.

What you can do to prepare

No doubt you already have a system in place to monitor all of your company's market communications. Figure out how you can upgrade that system to address the new requirements for things like 8-Ks, road show materials and forward-looking information. Don't forget to regularly review what is on your company's Web site.

Think about exactly when and how your company has previously released forward-looking information. Under the proposed rules, form A issuers can only release forward-looking information in the period before an offering if they have developed a practice of announcing projections over the preceding two years. Start documenting your company's consistent practices now.

Now is the time to begin converting your periodic reports to plain English. This is not a simple matter of

getting a good writer to sit down for an afternoon to redraft them. Creating a true plain English document will require the attention of your financial, legal and marketing staff (and possibly others), and everyone will have an opinion about how the job should be done. Once you produce something substantial (like a plain English 10-K), all subsequent reports will be easier, but you cannot hope to rush the first plain English project that you tackle.

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